IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs	)	
v.	)	Case No. 4:05-cv-00329-TCK-SAJ
TYSON FOODS, INC., et al Defendants.	)	

DEFENDANTS' REPLY ON THE MOTION FOR JUDGMENT ON THE PLEADINGS IN LIGHT OF *NEW MEXICO v. GENERAL ELECTRIC*

New Mexico v. General Electric, 467 F.3d 1223 (10th Cir. 2006), holds that CERCLA provides the exclusive damages remedy when allegations of injury to natural resources are brought under various statutory and common law theories. The Court should summarily reject Oklahoma's request that this Court ignore this binding precedent. CERCLA's Natural Resource Damage ("NRD") scheme preempts Oklahoma's claims for unrestricted damages under state and federal common law. As a result, this Court should dismiss entirely counts five and ten of Oklahoma's First Amended Complaint ("FAC") and the State's request for punitive and exemplary damages. Similarly, Oklahoma's requests for unrestricted monetary damages under counts four and six must be dismissed. Finally, this Court should rule that Oklahoma may not use any portion of any damages it may recover to pay contingency fee attorneys.

I. *New Mexico* Holds That A Ruling On Preemption Is Not Premature

Oklahoma argues Defendants' motion is not ripe because the State has not yet spent money for purposes prohibited by CERCLA and, therefore, no conflict has arisen between the State's requests for unrestricted monetary damages and CERCLA. *See* Resp. at 14. The State is wrong.

First, this argument is flatly contradicted by CERCLA and the *New Mexico* decision. Section 107(f)(1) of CERCLA requires that funds recovered for damage to natural resources be

spent solely on the restoration or replacement of those resources. *See* 42 U.S.C. § 9607(f)(1). Based on this principle, the Tenth Circuit held that CERCLA preempted state law claims for unrestricted monetary damages even before New Mexico had obtained a judgment or recovered any damages. *See New Mexico*, 467 F.3d at 1241 (affirming summary judgment on the plaintiff's state law claims, thereby precluding any judgment and recovery by New Mexico). The Tenth Circuit did not wait until the money was spent improperly to find preemption and neither should this Court. Indeed, in *New Mexico*, it was the potential that the Attorney General would spend monies in a prohibited way that compelled the Tenth Circuit to hold CERCLA preempted her state law claims. *See id.* at 1247-48 (holding CERCLA preempts state law claims for natural resource injuries where "a portion of the recovery ... could be used for something other (for example, attorney fees) than to restore or replace the injured resource") (parenthetical in original). Here, Oklahoma seeks unrestricted damages and 62 Okla. Stat. § 7.1.B requires the Oklahoma Attorney General to deposit those damages into the state treasury. The Tenth Circuit held this exact regime was in conflict with CERCLA and, therefore, preempted. *New Mexico*, 467 F.3d at 1242-47.

The cases Oklahoma cites in opposition do not conflict with *New Mexico*'s application of preemption in advance of judgment. *New Mexico* holds that Congress intended CERCLA to provide the exclusive remedy, a remedy that limits how NRDs may be utilized. *See* 467 F.3d at 1247-48. The Tenth Circuit held that the mere request for damages for natural resource injuries violates CERCLA if those damages are unencumbered by CERCLA's limitations on how the damages may be spent. *See id.* at 1247-48. In contrast, the cases cited by Oklahoma that caution against finding preemption for hypothetical conflicts involve scenarios where state laws merely pressure or influence the choices of regulated entities, so that the state law does not actually

conflict with federal law. Because the regulated party retains the option of applying state law in a manner that does not violate federal law, the conflict is only hypothetical or potential. *See, e.g., Bates v. Dow Agroscience*, 451 U.S. 431, 445 (2005) (holding that, while state tort liability might induce a pesticide manufacturer to change its federally regulated product label, no conflict occurs because the choice to do so is left to the manufacturer); *Rice v. Norman Williams Co.*, 458 U.S. 654, 662 (1996) (state liquor distribution law does not create an actual conflict with antitrust laws because it "does not require the distiller to impose vertical restraints of any kind; that is a matter for it to determine."); *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670-72 (9th Cir. 2003) (state ban on an oxygenating fuel additive was not an obstacle to the Clean Air Act's mandate for oxygenated gasoline because manufacturers could lawfully choose other chemicals). Here, Oklahoma has no such choice. Oklahoma seeks an unrestricted damage award and it is required by state law to deposit it into the state treasury. Thus, the State is wrong that this Court must wait for Oklahoma to recover and use that recovery to pay its contingency fee lawyers and deposit the remainder in the State's treasury. Resp. at 12-14. CERCLA prohibits Oklahoma's claims, and this conflict is immediate and ripe for this Court's review.

Second, Oklahoma has concealed from this Court that the State already has violated CERCLA. Specifically, Oklahoma failed to disclose that it is contractually obligated to spend a significant percentage of the damages it seeks to pay its private contingency fee counsel. *See* Ex. A (setting out contingency fee agreement between the Attorney General and private counsel).[1]

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[1] The Court may take judicial notice of the State's contracts. Federal Rule of Evidence 201(b) provides that "a judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Facts subject to judicial notice include facts that are a matter of public record. *Van Woudenberg ex rel. Foor v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001). Courts may consider such facts in a Rule 12(b)(6) or Rule 12(c) motion without converting it into a motion for summary judgment. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (citing 27A Fed. Proc. § 62:250 (2003)); *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000).

Pursuant to these contracts, the State is obligated to pay private lawyers 33.5 to 50% of any damages it recovers. *See id.* at ¶¶ 3.c, 3.e. The Tenth Circuit expressly held this exact arrangement violates CERCLA. *See New Mexico*, 467 F.3d at 1248. Significantly, the Tenth Circuit reached this holding notwithstanding that New Mexico had not yet paid its attorneys. Moreover, pursuant to these contingency fee contracts, Oklahoma already is indebted to its private lawyers. On December 15, 2006, the State's private counsel told this Court that the sampling and test data the State agreed to produce cost the State's attorneys "close to $4 million." Transcript of Dec. 15 hearing, at 125, lines 2-5.

Thus, a ruling on CERCLA's preemptive effect is neither hypothetical nor premature. It is uncontradicted that the State already has violated CERCLA, and this Court should prevent any further violations pursuant to the Tenth Circuit's mandate in *New Mexico*.

II. Alternative Pleadings Are Permitted By The Federal Rules Of Civil Procedure

Oklahoma asserts that Defendants are estopped from invoking *New Mexico* because Defendants have raised defenses that deny Oklahoma's CERCLA claims. Resp. at 8-11. This argument is contrary to the Federal Rules.

Oklahoma filed this blunderbuss action alleging numerous alterative and inconsistent theories of recovery based on absurd claims. Under Federal Rule of Civil Procedure 8(e)(2), Defendants are entitled to "set forth two or more statements of a ... defense alternatively or hypothetically . . . ." Such alternative defenses are particularly appropriate (and required) here because the State has over-pled its case, alleging a wide variety of claims regarding more than 1,000,000 acres of land that are owned by numerous parties in two states. The fact that Defendants have contested CERCLA liability does not negate a single holding in *New Mexico*. Preemption turns on whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *International Paper Co. v. Ouellette*,

479 U.S. 481, 492 (1987), not on whether the Plaintiffs or Defendants have pled alternative claims or defenses.

Oklahoma also asserts that, because it might lose its CERCLA NRD claim on the merits, its unrestricted damage claims must remain so that the Oklahoma Attorney General can bring home something for his effort. Resp. at 7-8. As Oklahoma knows from its *amicus* participation in *New Mexico*, the Tenth Circuit rejected this argument. In fact, in *New Mexico* the state's CERCLA claims were dismissed with prejudice prior to the court holding that the state law claims were preempted. *New Mexico*, 467 F.3d at 1237. The Tenth Circuit concluded that the absence of a CERCLA claim (and the state's inability to prevail on a CERCLA claim) was immaterial to the preemption analysis because Congress intended that CERCLA exclusively govern any claims alleging injury or harm to natural resources. *Id.* at 1247. In other words, no unrestricted tort claims may be used to recover damages for alleged harm to natural resources, regardless of whether the Court dismisses Oklahoma's CERCLA NRD claim in the future.

Plaintiffs also are incorrect that this Court may not adopt any interpretation of CERCLA that "leaves open the possibility of Defendants escaping liability altogether." Resp. at 7-8. This odious and arrant argument invites prosecutorial misconduct and rests on the repugnant premise that Plaintiff somehow is immune from Rule 11 and the burdens of pleading and proof that the rules impose on a plaintiff. No principle of law permits Defendants to be held liable if the Plaintiff fails properly to plead and prove a claim simply because he is the Attorney General.

III. *New Mexico* Holds That CERCLA's NRD Provisions Preempt Claims For Unrestricted NRD Damages

The State argues that numerous cases hold CERCLA does not preempt state law claims. Resp. at 6-7. However, all the cases Oklahoma cites involve cost recovery actions brought under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), or contribution actions brought under section

113, 42 U.S.C. § 9613, not claims for natural resource damages brought under the NRD provisions of section 107(f), 42 U.S.C. § 9607(f). Here, the State expressly and prominently pled a claim for natural resource damages under section 107(f). *See* FAC ¶¶ 78-89. The Tenth Circuit expressly held CERCLA preempts all state law damages and remedies under these claims. *New Mexico*, 467 F.3d at 1243-48.

Neither CERCLA § 107(a) cost recovery actions nor CERCLA § 113 contribution actions involve a statutory restriction on how damages may be used; Oklahoma's CERCLA § 107(f) claim does. *New Mexico* mandates dismissal of Oklahoma's non-CERCLA claims.

IV. *New Mexico* Rejected Oklahoma's Interpretation Of CERCLA's Saving Clauses

Notwithstanding the Tenth Circuit's express rejection of the argument in *New Mexico*, Oklahoma remarkably argues that CERCLA's savings clauses prevent any preemption of state law claims for unrestricted damages. Resp. at 5-7, 14-16. The Tenth Circuit considered this very argument and held:

> [A]n unrestricted award of money damages does not restore or replace contaminated natural resources . . . [W]e hold CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resources. We reach this conclusion notwithstanding CERCLA's saving clauses because we do not believe Congress intended to undermine CERCLA's carefully crafted NRD scheme through these saving clauses.

467 F.3d at 1247. In short, Oklahoma's argument was flatly rejected by the Tenth Circuit.

Oklahoma points to the Tenth Circuit's observation that CERCLA "undoubtedly preserve[s] a quantum of state legislative and common law actions and remedies related to the problem of hazardous waste", and blithely asserts that CERCLA preserves all state law "actions and remedies" with its saving clauses. Resp. at 15. The Tenth Circuit did no such thing. Instead, it simply specified what state actions and remedies CERCLA's NRD scheme preserves.

See 467 F.3d at 1246-48. Claims for unrestricted state law damage like those asserted by Oklahoma are notably absent from this list of preserved state actions and remedies.

V. CERCLA's Prohibition on Double Recovery Is Not Surplus Language

Oklahoma argues that preempting unrestricted state law damage claims for harm to natural resources renders the statutory prohibitions on double recovery under CERCLA §§ 107(f)(1) and 114(b) surplusage. Resp. at. 15-17. This argument is simply irrelevant to the Tenth Circuit's holding that CERCLA's NRD scheme preempts unrestricted claims for damages under state law.

Moreover, Oklahoma's argument misunderstands the interaction of CERCLA's various provisions. As the authorities cited in Oklahoma's Response demonstrate, *see* Resp. at 6-7, a plaintiff could seek to recover duplicative cleanup costs under CERCLA §§ 107(a) and 113 and state law tort claims. Thus, the fact that CERCLA preempts state law claims for unrestricted NRD damages under § 107(a) makes clear that CERCLA's prohibition on double recovery is not mere surplusage. Rather, the prohibition on double recovery plays an important part in CERCLA's NRD scheme.

VI. CERCLA Displaces Federal Common Law Causes of Action For NRDs

Oklahoma attempts to save its federal common law nuisance claim by conflating the standard for displacement of federal common law with that for field preemption. The State correctly notes "'the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law.'" Resp. at 18 (*quoting City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981)). Oklahoma then ignores *Milwaukee* by arguing that displacement of federal common law causes of action requires an indication that "Congress intended to occupy the field." Resp. at 18 (*citing Milwaukee*, 451 U.S. at 324). That statement, however, sets forth

the stringent standard for implied field preemption, *see English v. General Elec. Co.*, 496 U.S. 72, 78-80 (1990), not the easily-satisfied standard for finding displacement.

The correct standard holds that federal common law causes of action are displaced where "the scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee*, 451 U.S. at 315 n.8. And, contrary to Plaintiffs' claim, displacement is not disfavored. Resp. at 19. Rather, federal courts proceed with "a willingness to find congressional displacement of federal common law." 451 U.S. at 317 n.9 (emphasis omitted). Thus, once Congress has established federal regulation in an area, "there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319. *See also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) (refusing to create federal common law in area already regulated by Congress because "[t]o create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it").

As explained in *New Mexico*, CERCLA clearly "addresses the problem" of natural resource damages. *Compare* 467 F.3d at 1244 (discussing "CERCLA's comprehensive damage scheme which addresses damage assessment for natural resource injury, damage recovery for such injury, and use of such recovery") *with Milwaukee*, 451 U.S. at 319 ("The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law."). Accordingly, CERCLA displaces Oklahoma's federal common law claim.

VII. Unjust Enrichment Claims Conflict With CERCLA's NRD Provisions

Oklahoma fails to address the clear conflicts between CERCLA's NRD provisions and a state law claim for restitution or disgorgement based on a theory of unjust enrichment. Oklahoma's unjust enrichment claim would: (a) allow the State to recover the unrestricted monetary awards that were prohibited under *New Mexico*, (b) expose Defendants to the double

recovery which *New Mexico* condemned, and (c) employ a method of valuing natural resources that conflicts with CERCLA and its regulations. Motion at 12-15. Oklahoma makes the *ipse dixit* proclamation that such conflicts do not exist. Resp. at 21-22. This is not sufficient to escape *New Mexico*'s holding that CERCLA preempts unrestricted state law damages for natural resource injuries.

Even if Oklahoma's unjust enrichment claim were not preempted, as a matter of state law the existence of CERCLA's NRD provisions provide an adequate remedy at law. Regardless of whether the State ultimately prevails on that legal remedy, the mere availability of that remedy precludes equitable causes of action. *See Billingsley v. North*, 298 P.2d 418, 422 (Okla. 1956); *Robertson v. Maney*, 166 P.2d 106, 108 (Okla. 1946); *Robinson v. Southerland*, 123 P.3d 35, 45 (Okla. Civ. App. 2005). Thus, the State's claim of unjust enrichment must be dismissed.

Oklahoma responds to this point by confusing the standards for CERCLA preemption with the rule that equitable claims must be dismissed if the plaintiff has an adequate remedy at law. Oklahoma asserts that none of the Defendants' authorities "can be read as holding (or even suggesting) that dismissal of an equitable claim on preemption grounds is appropriate." Resp. at 22-23. That is beside the point. The cases on adequate remedies do not discuss preemption because they have nothing to do with preemption; they stand for the separate and irrefutable point that Oklahoma's equitable claims must be dismissed if the State has a legal remedy.

In sum, both (1) CERCLA preemption; and (2) the availability of a legal remedy, require dismissal of the State's unjust enrichment claim.

VIII. Punitive Damage Claims Conflict With CERCLA's NRD Provisions

Oklahoma denies any conflict exists between its punitive damage claim and Congress' goals in enacting CERCLA's NRD provisions. Resp. at 23. *New Mexico* is clear, however, that CERCLA preempts any "state remedy designed to achieve something other than the restoration,

replacement, or acquisition of the equivalent of a contaminated resource." 467 F.3d at 1247. Although Congress crafted CERCLA's NRD provisions "to protect the public interest in a healthy, functioning environment," Oklahoma impermissibly seeks "a windfall to the public treasury," 467 F.3d at 1247 (*quoting Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980)), and to the State's contingency fee lawyers. In *New Mexico*, the Tenth Circuit held that restoring natural resources was neither an exercise in punishment nor a money-making operation. *Id.* at 1247-48. It is undisputed that CERCLA's NRD provisions do not authorize punitive damage awards, which is consistent with Congress' mandate that damages are restricted to remediation and replacement of natural resources.

Finally, Oklahoma does not dispute that punitive damages are barred where no compensatory damages can be awarded. In light of *New Mexico*'s holding that CERCLA preempts unrestricted state law damage claims for NRDs, Oklahoma cannot recover punitive damages.

IX. Conclusion

For the foregoing reasons, this Court should dismiss (1) Oklahoma's request for unrestricted monetary damages under claims four, five, six and ten; (2) claims five and ten in their entirety; and (3) Oklahoma's demand for punitive damages. In addition, this Court should hold that Oklahoma may not use any recovery in this case to compensate its contingency fee attorneys in any manner.

Dated: January 30, 2007

Respectfully submitted,

/s/ Jay T. Jorgensen
Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Timothy K. Webster, *appearing pro hac vice*
Jay T. Jorgensen, *appearing pro hac vice*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 (phone)
(202) 736-8711 (fax)

-AND-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN WHALEY & COLDIRON P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 (phone)
(405) 239-6766 (fax)

-AND-

Robert W. George, OBA #18562
KUTAK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 (phone)
(479) 973-0007 (fax)

Attorneys for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson
OFFICE OF ATTORNEY GENERAL
State of Oklahoma
2300 N. Lincoln Blvd, Suite 112
Oklahoma City, OK 73105
ATTORNEY FOR PLAINTIFF

David Phillip Page
James Randall Miller
Louis Werner Bullock
MILLER KEFFER & BULLOCK
222 S Kenosha
Tulsa, OK 74120-2421
ATTORNEYS FOR PLAINTIFF

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS
502 W 6th St
Tulsa, OK 74119-1010
ATTORNEYS FOR PLAINTIFF

Robert Allen Nance
Dorothy Sharon Gentry
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS
5801 N Broadway
Ste 101
Oklahoma City, OK 73118
ATTORNEYS FOR PLAINTIFF

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Martin A. Brown
MCDANIEL LAW FIRM
320 S. Boston Ave. Suite 700
Tulsa, Oklahoma 74103
ATTORNEYS FOR PETERSON FARMS, INC.

Theresa Noble Hill
John H. Tucker
RHODES, HIERONYMUS, JONES, TUCKER & GABLE
POB 21100
100 W. 5th Street, Suite 400
Tulsa, OK 74121-1100
ATTORNEYS FOR CARGILL, INC., and CARGILL TURKEY PRODUCTION, INC.

R. Thomas Lay, Esq.
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
ATTORNEYS FOR WILLOW BROOK FOODS, INC.

and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

William H. Narwold
MOTLEY RICE LLC
20 Church St., 17th Floor
Hartford, CT 06103
ATTORNEYS FOR PLAINTIFF

Elizabeth C Ward
Frederick C. Baker
MOTLEY RICE LLC
28 Bridgeside Blvd
Mount Pleasant, SC 29464
ATTORNEYS FOR PLAINTIFF

C. Miles Tolbert
SECRETARY OF THE ENVIRONMENT
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

/s/ Jay T. Jorgensen
Jay T. Jorgensen